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The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentence Entrapment to Combat Governmental Manipulation of Sentencing

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I. INTRODUCTION

Consider the following scenario:[1] The police conduct an undercover sting operation targeting drug traffickers. An undercover officer approaches a suspected drug dealer and arranges to purchase crack cocaine. Over a period of five weeks, the suspect makes seven sales to

1. See, for example, *United States v. Barth*, 788 F. Supp. 1055 (D.Minn. 1992).

the officer, and the police arrest him after the final sale. The total amount sold by the defendant was 50.4 grams, just enough to place him within the mandatory minimum sentence of ten years.[2] Had he sold up to 49.9 grams, his mandatory minimum sentence would only have been five years. The district court hearing this case found it "not at all fortuitous" that the agent arrested the defendant only after the agent "had arranged enough successive buys to reach the magic number."[3] Is this fair? The district court in *United States v. Barth* did not think so.[4]

Under the old sentencing system, discretion over sentencing resided with judges.[5] With the adoption of the Federal Sentencing Guidelines (the "Guidelines"), sentencing discretion has, in effect, shifted from judges to prosecutors and even to law enforcement field agents.[6] The agents, with little supervision, can negotiate for any amount of drugs they choose, and this amount will determine the defendant's drug sentence.[7]

Courts have developed the "sentence entrapment" doctrine to combat this kind of manipulation.[8] Until recently, sentence entrapment existed largely in theory, but with the Ninth Circuit's decision in *United States v. Staufer*, the sentence entrapment claim has become a reality.[9]

While the general theory of entrapment has a long history,[10] courts perceived a need for sentence entrapment only after the enactment of the Guidelines.[11] The Guidelines mark an enormous shift in the goals and methods of criminal sentencing. These changes have

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2. 21 U.S.C. § 841(b) (1994 ed.).

3. *Barth*, 788 F. Supp. at 1057.

4. Id. at 1057-58 (holding that the Federal Sentencing Guidelines artificially inflated the defendant's culpability and that the circumstances of the drug purchases constituted a mitigating factor in sentencing). However, this decision was overturned on appeal. *United States v. Barth*, 990 F.2d 422, 424-25 (8th Cir. 1993).

5. *United States v. Staufer*, 38 F.3d 1103, 1106-1107 (9th Cir. 1994). See also *United States v. LaGuardia*, 902 F.2d 1010, 1013 (1st Cir. 1990) ("It is by now apodictic that the sentencing guidelines effectively stunt the wide discretion which district judges formerly enjoyed in criminal sentencing").

6. See *Staufer*, 38 F.3d at 1107-1108 (comparing the previous sentencing system, under which courts could use their discretion to prevent governmental abuse, to the current system in which courts have diminished discretion).

7. Id.

8. For the first court of appeals case to discuss the claim of sentence entrapment, see *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991) ("We are not prepared to say there is no such animal as 'sentencing entrapment' ").

9. 38 F.3d at 1108 ("We are persuaded that 'sentencing entrapment' may be legally relied upon to depart under the Sentencing Guidelines").

10. See, for example, *Sorrells v. United States*, 287 U.S. 435 (1932). *Sorrells* was the first supreme court case holding in favor of the entrapment theory.

11. *Staufer*, 38 F.3d at 1106-07.

created the potential for governmental abuse and manipulation of sentencing.[12]

This Note examines sentence entrapment against the background of supreme court entrapment jurisprudence. Part II introduces the *Staufer* decision and the Ninth Circuit's version of the sentence entrapment defense. Part III discusses the history of the Guidelines and how they lead to governmental manipulation of sentencing. Part IV reviews supreme court entrapment jurisprudence. Part V discusses the various theoretical approaches taken by the circuits in addressing sentence entrapment. Part VI analyzes these different theories of sentence entrapment in the context of the Supreme Court's general entrapment jurisprudence and proposes a theoretically sound and practical approach to sentence entrapment. Part VII discusses the role of this proposed version of sentence entrapment in light of other possible solutions to the problem of governmental manipulation of sentencing.

II. THE *STAUFER* DECISION AND THE ADOPTION OF SENTENCE ENTRAPMENT AS A BASIS FOR DEPARTURE FROM THE GUIDELINES

In *United States v. Staufer*, Mark Staufer was convicted of possession of LSD[13] with intent to distribute and was sentenced to 151 months in prison and five years probation.[14] On appeal the Ninth Circuit held that a departure from the Guidelines-mandated sentence was warranted based on sentence entrapment.[15]

In August of 1992, an acquaintance introduced Staufer to an undercover agent who was posing as someone interested in purchasing LSD.[16] Unbeknownst to Staufer, his acquaintance was a confidential informant and a convicted felon who was assisting the government in order to reduce his own ten-year sentence.[17] Acting with no supervision by the government, the informant contacted Staufer constantly in an effort to persuade him to sell drugs.[18] In fact, the agent called Staufer so often at work that Staufer's supervisor became upset

12. See notes 83-105 and accompanying text.
13. Lysergic diethylamide acid.
14. 38 F.3d at 1104.
15. Id. at 1108.
16. Id.
17. Id. at 1105.
18. Id.

with him for spending too much time on the telephone.[19] At the time of the sting operation, Staufer had no money to his name.[20] He lived in a garage because he was unable to pay rent and had numerous outstanding bills.[21] He had recently been robbed, beaten, and hospitalized.[22] Under these conditions he was finally induced to sell.[23]

At the meeting, Staufer had only wanted to sell 5,000 doses of LSD, but the agent insisted instead that Staufer provide 10,000 doses.[24] When Staufer displayed reluctance, the agent immediately offered more money.[25] At trial the only evidence of previous drug sales was one instance in which Staufer had bought fifteen dollars worth of LSD and had given some to friends for eight dollars.[26]

The Ninth Circuit held that the government had entrapped Staufer by convincing him to sell a quantity of drugs in excess of what he was predisposed to sell.[27] The court held that sentence entrapment occurs when a defendant who is otherwise predisposed to commit a minor or lesser offense is entrapped into committing a greater offense subject to more severe punishment.[28] In so holding, the court observed that a recent amendment to the Guidelines allowed departure from the Guidelines under similar circumstances.[29] Under this amendment, a court can depart from the Guideline sentence if, in an undercover operation, the government agent sold drugs at a price significantly below market value, thereby causing the suspect to purchase more than his available resources would otherwise allow. The court inferred from this amendment that the Sentencing Commission recognized the policy that government agents should not be able to structure undercover operations to maximize sentences.[30]

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19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id. at 1108.
28. Id. at 1106.
29. Id. at 1107 (citing Amend. Application Note to § 2D1.1, ¶ 486). The amendment states the following:

> If in a reverse sting [operation], . . . the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

Id.
30. Id.

Therefore, the court held that a departure from the Guideline sentence was warranted in this case, based on entrapment.[31]

The *Staufer* court explained that the Guidelines have led courts around the country to rethink the rule of entrapment.[32] The court noted that prior to the Guidelines, judges could exercise their discretion in sentencing and ensure that defendants' prison terms did not exceed their culpability.[33] Under the Guidelines, however, judges no longer exercise this discretion, and the entrapment doctrine designed for the old system cannot protect against manipulation of sentencing in the new system.[34] Therefore, to combat manipulation of sentencing and to better tailor sentences to culpability, the court adopted the doctrine of sentence entrapment.[35]

III. SENTENCING AND THE GUIDELINES

A. Before the Guidelines: Disparity, Uncertainty, and Judicial Discretion

In 1984, Congress passed the Sentencing Reform Act (the "Act").[36] The Act established the Federal Sentencing Commission (the "Commission"), which then promulgated the Federal Sentencing Guidelines.[37] The Guidelines went into effect in 1987.

In the pre-Guidelines federal system, disparity in sentencing was the norm.[38] Disparity in sentencing is a problem with two components: lack of uniformity and lack of proportionality.[39] With a lack of uniformity, those who commit the same crime and are equally culpable receive different sentences. With a lack of proportionality, defendants of different culpabilities receive the same sentence. Lack

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31. Id.
32. Id. at 1106.
33. Id.
34. Id. at 1107.
35. Id. at 1107-08.
36. Pub. L. No. 98-473, 98 Stat. 1987, codified at scattered sections of 18 U.S.C. (1994 ed.).
37. See 28 U.S.C. § 991 (1994 ed.).
38. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 7 (1972) (stating that "nobody doubts that essentially similar people in large numbers receive widely divergent sentences for essentially similar or identical crimes").
39. See Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 932-34 (1990) (discussing the two strands of disparity—uniformity versus proportionality).

of uniformity was the predominant problem in pre-Guidelines sentencing and led to great disparity in sentences.[40] Lack of uniformity produced sentences ranging from three to twenty years imprisonment for identical cases in the Second Circuit.[41] Lack of uniformity also resulted in factors totally unrelated to culpability, such as the region of conviction and the race and sex of the defendant, having a large effect on sentencing.[42] Conviction in the South resulted in sentences approximately six months longer than average while conviction in central California led to sentences twelve months shorter.[43] Female bank robbers were likely to serve six months less than similarly situated males, and black bank robbers convicted in the South were likely to serve thirteen months more than similarly situated bank robbers convicted in other regions.[44]

Pre-Guidelines sentencing was also characterized by uncertainty. Since the Parole Commission controlled when a prisoner would be released, the sentence imposed by a judge was not the actual amount of time a defendant would serve.[45] Under the pre-Guidelines system, a judge might sentence a defendant to twelve years, but the Parole Commission could release him after four.[46] Since release by the Parole Commission was probable but not inevitable, this system misled both judges and defendants.[47] Uncertainty in sentencing exacerbated the problem of disparity as some judges tried to calibrate their sentences to what they guessed the Parole Commission would do, while others ignored the effects of parole.[48]

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40. See Ilene H. Nagel, Stephen Breyer and Terence MacCarthy, *Equality Versus Discretion in Sentencing*, 26 Am. Crim. L. Rev. 1813, 1813-14 (1989) (introduction by Frank H. Easterbrook) (describing past practices of judges).

41. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 5 (1988) (citing A. Partridge and W. Eldgridge, *The Second Circuit Sentencing Study: A Report to the Judges* 1-3 (Federal Judicial Center, 1974)).

42. See *Sentencing Guidelines, Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Cong., 1st Sess. 665, 675-77 (1987) (statement of Ilene H. Nagel, Commissioner, Sentencing Commission).

43. Id. at 676.

44. Id. at 676-77.

45. Bruce M. Selya and Matthew Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 Notre Dame L. Rev. 1, 4 (1991).

46. Breyer, 17 Hofstra L. Rev. at 4 (cited in note 41).

47. Id. See Nagel, Breyer and MacCarthy, 26 Am. Crim. L. Rev. at 1816 (cited in note 40) ("In addition to unwarranted disparity, sentence pronouncements were misleading; a twelve year term of imprisonment meant four years in most instances, but only the victim, his family, and the public were duped. Because of this systemic sham, each player in the criminal justice system second-guessed the next, with no one recommending a sentence thougbt to be appropriate to the offense").

48. See Breyer, 17 Hofstra L. Rev. at 4 (cited in note 41).

In the pre-Guidelines system, judges had the discretion to select a punishment within broad statutory limits. Congress provided only a broad sentencing range, sometimes between zero and twenty-five years.[49] The judge was not told whether to start at the bottom of the range and work up, start at the top and work down, or start somewhere in the middle.[50] He was not told which factors were relevant in sentencing, whether these factors should mitigate or enhance a sentence,[51] or even which sentencing goals should inform his decisions.[52] Under this system, the judge was not obligated to give reasons for the sentence, and sentences were rarely appealable.[53] If a sentence was appealed, it would most likely be upheld.[54] Judge Marvin Frankel commented that this system was "by and large a bizarre 'non system' of extravagant powers."[55]

B. The Guidelines: An Attempt to Solve the Problem

In enacting sentencing reform legislation, Congress sought to address the two major problems in the pre-Guidelines system, uncer-

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49. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 901 (1991).

50. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1687-88 (1992).

51. See Frankel, 41 U. Cin. L. Rev. at 5 (cited in note 38) (commenting that some courts may treat a guilty plea as a mitigating factor because it saves the public the trouble of a jury).

52. See Freed, 101 Yale L. J. at 1688 (cited in note 50) (stating that judges often disagreed regarding which of the four goals of sentencing should be followed: incapacitation, rehabilitation, deterrence, or punishment). See also Frankel, 41 U. Cin. L. Rev. at 5 (cited in note 38) (noting that nothing tells judges which sentencing goals should be followed nor how to sort out conflicts between opposing sentencing goals).

53. Freed, 101 Yale L. J. at 1688 (cited in note 50). See *United States v. Tucker*, 404 U.S. 443, 447 (1972) (stating that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review").

54. See, for example, *Williams v. New York*, 337 U.S. 241 (1949). The *Williams* Court held that the sentencing judge could consider the defendant's prior criminal record without permitting witness confrontation on the subject. Id. at 252. The dissent argued against imposition of the death penalty stating that the court had relied on "a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant." Id. at 253 (Murphy, J., dissenting).

55. Frankel, 41 U. Cin L. Rev. at 2 (cited in note 38) (stating that "the sentencing stage has come to strike me as the key focus of disease in our apparatus of punishment"). See Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 916 (1962) (noting that "the new penology has resulted in vesting in judges and parole and probation agencies the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system").

tainty and disparity.[56] To lessen the uncertainty of sentences, Congress abolished the Parole Commission.[57] Now, except for small deductions for good behavior, a defendant serves the full sentence handed down by the judge.[58] To decrease disparity in sentencing, Congress created the Federal Sentencing Commission, which produced the Federal Sentencing Guidelines.[59]

The Guidelines moved sentencing from an indeterminate system based on judicial discretion to a determinate one that tells the court which factors to consider in sentencing and how much weight to place upon each factor. The Guidelines are based on a grid with one axis corresponding to the charged offense and the other axis corresponding the criminal history of the defendant.[60] The judge follows the grid to the appropriate sentence—the more serious the offense and the longer the criminal history, the more severe the sentence. If the judge finds that any of the specified mitigating or enhancing factors are present, he adjusts the sentence up or down as the Guidelines demand. He then arrives at a narrow sentencing range from within which he must choose the sentence.[61]

The Guidelines provide that a judge can depart from this sentencing range, but only if there exists an aggravating or mitigating circumstance that was not adequately taken into account by the Commission in formulating the Guidelines and that should result in a sentence different from that prescribed.[62] These departures are subject to appellate review for reasonableness.[63] Though the Guidelines seem to suggest a permissive attitude toward departure,[64] the courts of appeals have been very restrictive and have held the trial courts to the Guidelines-mandated sentence even in the most compelling of circumstances.[65]

The central compromise made by the Commission in creating the Guidelines was over the range of information that would be

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56. Breyer, 17 Hofstra L. Rev. at 4 (cited in note 41).
57. Id.
58. Id.
59. Id. at 5.
60. Selya and Kipp, 67 Notre Dame L. Rev. at 6 (cited in note 45).
61. Id. at 7-8.
62. 18 U.S.C. § 3553(b).
63. 18 U.S.C. §§ 3742(e)(3), (f)(2).
64. See, Alschuler, 58 U. Chi. L. Rev. at 910 (cited in note 49) (noting that Judge Leval found that the Guidelines did not attempt to constrain substantially the power of judges to depart).
65. Id. at 910-11. See, for example, *United States v. Brewer*, 899 F.2d 503, 508 (6th Cir. 1990) (holding that the defendant's responsibility to care for small children did not justify departure); *United States v. Poff*, 926 F.2d 588, 591 (7th Cir. 1991) (holding that the defendant's mental illness did not justify departure).

considered at sentencing.[66] In other words, should the judge consider all the circumstances surrounding the crime and the whole personal history of the defendant, or should the judge merely focus on the charged crime and give identical sentences to all those who commit the same statutory violation?[67]

Confronted with this difficult choice, the Commission compromised and adopted Guidelines that focus both on the charge and the circumstances surrounding the crime. According to Judge (now Justice) Breyer, the Commission attempted to codify the average sentencing practices that existed before the Guidelines.[68] Notwithstanding this effort to conform to past practices, the Guidelines seem to represent a shift in the goals of sentencing from rehabilitation to retribution or "just deserts."[69] This change in values is reflected in the emphasis the Guidelines place on harm to society rather than on the characteristics of the defendant that make him more or less amenable to reform.[70] One commentator has noted that a rationale emphasizing "proportionality and desert" should place the primary emphasis on the seriousness of the offender's present crime.[71]

The Guidelines have taken this view to heart by making harm to society the determinative factor in sentencing. For example, the

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66. Breyer, 17 Hofstra L. Rev. at 13 (cited in note 41).

67. See id. at 8-14. Breyer discusses the compromise made by the Commission regarding procedural versus substantive justice. Id. A sentencing system that focuses on procedural fairness allows the court to consider only evidence that satisfies strict procedural rules. Id. at 9. However, this type of a system will tend to treat people who commit the same statutory violation in the same way even though the crimes may in fact be very different. Id. Thus, a bank robber may take a lot or a little money, use or not use a gun, or injure or not injure the teller, yet under such a system all bank robbers will tend to be lumped together. Id. at 9-10.

A sentencing system that focuses on substantive fairness will attempt to sentence for what "really" happened. Id. at 10. This will result in individualized sentences but will necessitate that in sentencing, the court will be able to view evidence that has not been tested by the procedural rules designed to protect the defendant. Id. at 10-11. If the court did subject all the evidence in sentencing to trial procedures, the court would be overwhelmed by the task and the system would become administratively unworkable. Id. at 11.

68. Id.

69. See Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187, 187 (1993).

70. Alschuler, 58 U. Chi. L. Rev. at 908-909 (cited in note 49) (stating that the Guidelines' grid approach to sentencing "has yielded a profound and disturbing change in penal philosophy. It has led to the substitution of crime tariffs for the consideration of situational and offender characteristics in even simple and recurring cases. The focus has been on harms, not people").

71. Andrew von Hirsch, *Guidance by Numbers or Words? Numerical Versus Narrative Guidelines for Sentencing*, in Martin Wasik and Ken Pease, eds., *Sentencing Reform: Guidance or Guidelines?* 46, 49 (Manchester, 1987). But see Alschuler, 58 U. Chi. L. Rev at 909 (cited in note 49) (disagreeing with this statement by von Hirsch and characterizing it as a "self-evident falsehood").

Guidelines use quantity, such as the amount of money laundered or the amount of drugs sold, as an approximation of the harm to society and the danger posed by the defendant.[72] Particularly in drug crimes, quantity drives sentencing.[73] Because the quantity-determined starting point in drug sentences is very high, prosecutors and judges often refrain from imposing enhancements for aggravating factors because they believe the resulting sentence would be far too harsh.[74] Because Congress has created mandatory minimum sentences based on drug quantity, the sentencing floor is often set by quantity as well. Therefore, drug quantity becomes not just the most important sentencing factor, but in effect the only factor.[75]

C. After the Guidelines: Disparity and Governmental Manipulation

By focusing on quantity, the Guidelines have made progress against one of the twin components of disparity, lack of uniformity. However, focusing on quantity has exacerbated the other component of disparity, lack of proportionality. In fact, Commissioner Ilene Nagel admits that in creating the Guidelines the Sentencing Commission was more concerned with uniformity—making sentences alike, than with proportionality—insuring the likeness of those grouped together for similar sentences.[76] The Guidelines' focus on quantity has led to a decrease in proportionality of sentences in at least two ways.

First, for low level drug offenders, quantity does not accurately reflect culpability.[77] The Guidelines prescribe sentences with the belief that quantity of drugs reflects a defendant's position in the drug hierarchy.[78] Quantity can show the defendant's trust within the drug

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72. See David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 451-453 (1993).

73. Id. See also Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, not Disparity*, 29 Am. Crim. L. Rev. 833, 853-854 (1992) (noting that under the Guidelines distributing 5 kilos of cocaine gets 121 to 151 months incarceration, 50 kilos gets 188 to 235 months, 150 kilos gets 235 to 293 months, and 1500 kilos gets 30 years to life).

74. Id. at 854.

75. Id.

76. Nagel, 80 J. Crim. L. & Criminology at 934 (cited in note 39). See Alschuler, 58 U. Chi. L. Rev. at 909-10 (cited in note 49) (arguing that the problem with the Guidelines is not lack of uniformity but too much aggregation—treating different defendants the same).

77. See generally Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases where Quantity Overstates Culpability*, 3 Fed. Sent. Rptr. 63 (1990) (criticizing the Guidelines and quantity-based penalties for disproportionate severity toward lower level drug offenders).

78. See id. at 63 (noting that the quantity-based sentencing guidelines often apply to defendants less culpable than the kingpins who are the "primary targets of the law").

ring or it can show the amount of money he expects to make from the transaction.[79] Often, however, for couriers and other low level participants, quantity is a poor measure of culpability.[80] For self-protection, drug producers hire couriers who have limited contact with the organization.[81] Often, the courier does not know the quantity or even the type of drugs he is carrying, yet he is charged with the same crime as the supplier. Because quantity determines the sentence, the low level courier who happens to be transporting a large amount of drugs will be sentenced as if he were a drug kingpin.[82]

The second factor causing a lack of proportionality[83] and, therefore, disparity is the manipulation of undercover sting operations.[84]

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79. Id.

80. Id.

81. Id. at 64.

82. See id. at 64-65 (arguing that the low level offender is further disadvantaged under the Guidelines because the court will be less likely to depart downward). Under the Guidelines, the court may depart downward for cooperation, but only if the defendant provides substantial assistance, meaning that the information the defendant provides must have real value in the investigation of another case. Id. A low level drug courier who was purposely chosen for the job because of his lack of knowledge of the drug organization will have little valuable information to offer the prosecution and, therefore, little chance of receiving a departure. Id. In this way, the drug courier may receive a heavier sentence than the more culpable kingpin who has information to offer.

83. Another source of disparity that has received much attention from commentators and courts is the Guidelines' shift in sentencing discretion from judges to prosecutors. See, for example, Robert E. Underhill, *Sentence Entrapment: A Casualty of the War on Crime*, 1994 Ann. Surv. Am. L. 165, 166 (discussing problems arising in sting operations as a result of the shift from judicial to prosecutorial sentencing discretion). Judges' hands are tied by the determinate sentencing structure of the Guidelines, but prosecutors are free to choose the charge and to decide which facts to allege at sentencing, which may mitigate or enhance the sentence. See *United States v. Harrington*, 947 F.2d 956, 964-69 (D.C. Cir. 1991) (Edwards, J., concurring).

Judge Harry Edwards presents an example of how large an effect the exercise of the prosecution's newfound discretion over sentencing can have over a defendant's sentence:

> Consider the case of a defendant who is charged with possessing ten grams of crack cocaine with intent to distribute—an offense carrying a Guideline sentence of 63-78 months for a defendant with no criminal record, and a mandatory minimum sentence of five years. If the prosecutor elects to add a weapons charge in connection with the drug offense, the Guideline range goes to 78-97 months and the mandatory minimum rises to ten years. The prosecutor also may choose to assert certain subsidiary facts which will affect the sentence, such as committing the offense at or near a school, or distributing to a minor—both of which add at least two offense levels (a minimum enhancement of 19 months in my hypothetical).

Id. at 964-65. Based upon this hypothetical, Judge Edwards drew the following conclusion:

> Instead of eliminating sentencing discretion and subjectivity, the Guidelines merely transferred it from district judges—who, whatever their perceived failings, are at least impartial arbiters who make their decisions on the record and subject to public scrutiny and appellate review—to less neutral parties who rarely are called to account for the discretion they wield. Thus, the discretion and disparity game continues; it is only the players who have changed.

Since quantity drives sentencing under the Guidelines, prosecutors and undercover field agents can manipulate the likely sentence by selecting the quantity of contraband to be proposed in the undercover transaction.[85] They can select a longer sentence by suggesting more contraband. Prosecutors have broad authority to guide undercover sting operations, meaning that many of the decisions affecting sentencing fall within the unreviewable realm of prosecutorial discretion.[86] Prosecutors guiding undercover operations routinely decide which people to target, how many opportunities for commission of the crime to offer, the type, extent, and location of the crime, and when to terminate the operation.[87] Undercover field officers with little or no guidance can make similar decisions.[88] The decision to incorporate into the undercover operation aggravating factors such as selling crack instead of powder cocaine, selling near a school, or having firearms present during the crime falls within the discretion of prosecutors and field agents.[89] As a consequence of such governmental influence of sentencing under the Guidelines, numerous examples of governmental manipulation of sentencing have reached the courts.

In *United States v. Cannon*,[90] an undercover agent posing as an illegal gun seller met with the defendants who were drug dealers. The defendants had stated that they wanted to purchase five handguns. Along with an assortment of handguns, the agent brought two machine guns to the meeting. Initially, the defendants purchased only three handguns, but after some salesmanship by the agent they purchased one of the machine guns.[91] The relevant statute imposed a five year mandatory sentence for the defendants' purchase of the

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Id. at 966-967 (footnote omitted).

The shift in sentencing discretion left Judge Edwards to question "whether the Guidelines, in transferring discretion from the district judge to the prosecutor, have not left the fox guarding the chicken coop of sentencing uniformity." Id. at 965 n.5. For additional commentary on this subject, see Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 189-200 (1991) (discussing numerous ways in which prosecutorial discretion can create sentencing disparities).

84. Yellen, 78 Minn. L. Rev. at 452-53 (cited in note 72).

85. Id. at 453.

86. Saul M. Pilchen, *The Federal Sentencing Guidelines and Undercover Sting Operations: A Defense Perspective*, 4 Fed. Sent. Rptr. 115, 115 (1991).

87. Id.

88. Id.

89. Id.

90. 886 F. Supp. 705 (D.N.D. 1995). The court held that the government's conduct was both sentence entrapment and sentence manipulation and that the "tainted conduct" would, therefore, be excluded from consideration at sentencing. Id. at 709.

91. Id. at 706-07.

handguns but increased the mandatory sentence to thirty years for buying the machine gun.[92]

Similarly, in narcotics stings, the government manipulates sentences by persuading suspects to buy amounts large enough to trigger a statutory minimum, even if the suspect is unable to afford or acquire that quantity.[93] Agents may postpone arrest until the suspect has purchased an aggregate quantity that will ensure the statutory minimum penalty.[94] The government also manipulates sentences by selling drugs at a reduced price,[95] or by delivering more drugs to the defendant than he purchased.[96] Such practices can inflate the drug quantities associated with the defendant, distorting his sentence so that it is disproportionate to the defendant's actual culpability.[97] In *United States v. Rosen,*[98] the suspect negotiated, paid for, and expected to receive only thirty pounds of marijuana. Instead, the undercover agent loaded 150 pounds into the suspect's car. The extra 120 pounds added thirty months to the defendant's sentence.[99]

Because criminal penalties are more stringent for dealing crack cocaine than for dealing powder cocaine, agents who agree to buy powder cocaine may later demand that the suspect convert the powder into crack.[100] This is accomplished in minutes by heating the powder in a microwave oven, but the conversion adds years to a defendant's sentence.[101]

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92. Id.

93. Heaney, 28 Am. Crim. L. Rev. at 195 (cited in note 83).

94. Id.

95. See, for example, *United States v. Sivils*, 960 F.2d 587 (6th Cir. 1992), where the defendant was told that he would receive approximately 1.1 pounds of cocaine (498.96 grams) for $15,000. The undercover law enforcement officers then decided to "sell" the defendant an entire kilogram, over double the amount originally specified, for the same price. With the recent amendment to the Guidelines, Amend. Application Note to § 2D1.1, ¶ 486 (cited and quoted in note 29), this form of manipulation should become less of a problem. The amendment allows the court to depart downward from the Guideline sentence if the defendant bought more of a controlled substance because the government agent set the price below market value. See also note 29.

96. See, for example, *United States v. Rosen*, 929 F.2d 839, 843 (1st Cir. 1991) where undercover officers loaded the defendant's car with five times more marijuana than the defendant paid for and anticipated receiving.

97. Heaney, 28 Am. Crim. L. Rev. at 196 (cited in note 83).

98. 929 F.2d 839 (1st Cir. 1991).

99. Id. at 843.

100. See *United States v. Shepherd*, 857 F. Supp. 105, 111 (D.D.C. 1993) (holding that sentence entrapment or sentence manipulation would act to exclude evidence of dealing crack from the calculation of the sentence).

101. Id. at 106.

Sentence manipulation also appears in money crimes such as bribery and money laundering. In *United States v. Connell,*[102] a Rhode Island stockbroker agreed to launder money for an undercover agent.[103] At first, the agent claimed that the money came from a gambling operation in Atlantic City. After three episodes of money laundering, the agent told the defendant that the money was from the drug trade. The defendant continued to launder the money. The court adjusted the defendant's sentence upward by five levels pursuant to the Guidelines, which called for a five-level increase in cases where the defendant knew or believed that the funds were criminally derived.[104] The defendant claimed that the agent created the tale about the illicit origin of the funds solely to guarantee that the defendant's sentence would be increased. The defendant believed that he was too far into the money laundering scheme to stop and that his knowledge of the money's origin placed him in danger should he refuse to cooperate.

Notwithstanding these abuses, no circuit court had agreed to reduce a sentence because of governmental manipulation. When presented with the *Staufer* case, however, the Ninth Circuit took a different tack. As a result, in *Staufer*, the Ninth Circuit became the first federal circuit court to hold that a court could depart from the Guidelines-mandated sentence based on the theory of sentence entrapment.[105]

IV. ENTRAPMENT GENERALLY

Undercover operations that set traps for unwary criminals are essential for policing consensual crimes such as drug dealing and prostitution. These crimes are covert and generally do not produce a "victim" who will provide the police with information. The only way for the police to gain evidence about the crime is to involve themselves in the criminal enterprise. Sometimes, however, this involvement can rise to the level of creating crime that would not otherwise occur. When a court finds that law enforcement has wandered from its

102. 960 F.2d 191 (1st Cir. 1992).
103. Id. at 193.
104. Id.
105. As noted earlier in this Note, the district court in *Barth*, 788 F. Supp. at 1055, was the first court to depart from the Guidelines based on sentence entrapment, but its decision was overturned on appeal. 990 F.2d at 422. Since the *Staufer* decision, the District Court of North Dakota has also departed from the Guideline sentence based on sentence entrapment. *Cannon*, 886 F. Supp. at 705.

proper function of preventing crime to manufacturing crime, the court can step in by recognizing the entrapment defense.[106]

In *Sorrells v. United States,*[107] the Supreme Court developed the entrapment doctrine for the federal courts. The Court meant for entrapment to be used as a defense for those unfairly trapped by an undercover investigation in which the government participated in the crime.[108] Under the test, the threshold question is whether the government encouraged the defendant to commit a criminal act.[109] If so, then the *Sorrells* majority would apply a subjective analysis and ask whether the defendant was predisposed to commit the crime.[110] If, under this subjective approach, a court finds that the defendant was predisposed to commit the crime, then the entrapment defense is unavailable.[111] If, however, the court finds that the defendant was not predisposed, then the court will hold that the defendant was entrapped, and the defendant is not liable for the crime.[112] The Court justified its creation of the entrapment doctrine by explaining that Congress in drafting its criminal statutes could not have intended to punish the "otherwise innocent" who were led to crime by government agents.[113] Subsequent opinions make it clear that the focus of the entrapment defense is the question of the defendant's guilt, not the police misconduct.[114]

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106. Judge Posner explains why the courts defend against governmental efforts to induce people to commit crimes they would otherwise not commit:

> [T]he proper use of the criminal law in a liberal society is to regulate potentially harmful conduct for the protection of society, rather than to purify minds and to perfect character. A person who would not commit a crime unless induced to do so by the government is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character.

United States v. Hollingsworth, 9 F.3d 593, 598 (7th Cir. 1993).

107. 287 U.S. 435 (1932).

108. Id. at 445.

109. *Lopez v. United States*, 373 U.S. 427, 434-35 (1963).

110. Id.

111. *Hampton v. United States*, 425 U.S. 484, 490 (1975) (stating that the "petitioner's conceded predisposition rendered [the entrapment] defense unavailable to him").

112. *Sorrells*, 287 U.S. at 445.

113. Id. at 448-49 ("We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute"). See *Sherman v. United States*, 356 U.S. 369, 372 (1958) ("The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime").

114. *Hampton*, 425 U.S. at 488.

The concurring opinion in *Sorrells*, authored by Justice Roberts, adopted an objective test for determining entrapment.[115] The concurrence found that a defendant is entrapped only if the methods used would likely induce an "ordinary law abiding citizen" to commit the offense.[116] This test focuses on the propriety of the government's conduct while ignoring the defendant's predisposition.[117] Justice Roberts based this test on the public policy of protecting the integrity of the judicial process.[118] Later opinions favoring the objective test have emphasized other public policy goals such as the deterrence of unlawful police conduct and the need to give guidance in regulating police conduct.[119]

The Supreme Court has explicitly stated that the entrapment defense is not based on the Constitution.[120] Therefore, different jurisdictions may choose whether to adopt the defense and which version to adopt.[121] The Federal Government and a majority of the states follow the subjective approach as consistently articulated by the majority of the Supreme Court.[122] The objective approach is steadily gaining adherents and has been adopted by the Model Penal Code[123] and by many states, through both judicial decisions and legislative pronouncements.[124]

Although the entrapment defense is not constitutionally required,[125] a number of Justices have recognized a separate fifth

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115. 287 U.S. at 453 (Roberts, J., concurring).

116. Id. at 458-59.

117. Id.

118. Paul H. Robinson, 2 *Criminal Law Defenses* § 209(b) at 513 (West, 1984).

119. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring) ("The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because . . . the methods employed on behalf of the Government to bring about conviction cannot be countenanced"). See Robinson, 2 *Criminal Law Defenses* § 209(b)at 513 (cited in note 118) (explaining the difference between objective and subjective entrapment).

120. *United States v. Russell*, 411 U.S. 423, 433 (1973) ("Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable").

121. See Scott C. Paton, Note, *"The Government Made Me Do It": A Proposed Approach to Entrapment under* Jacobson v. United States, 79 Cornell L. Rev. 995, 1000-06 (1994) (discussing the subjective and objective approaches and noting hybrid approaches developed by various states).

122. Damon D. Camp, *Out of the Quagmire after* Jacobson v. United States: *Towards a More Balanced Entrapment Standard*, 83 J. Crim. L. & Criminology 1055, 1063 (1993).

123. Model Penal Code § 2.13 (ALI, 1985).

124. For example, the objective approach was adopted by judicial decision in Massachusetts in *Commonwealth v. Harvard*, 253 N.E.2d 346 (Mass. 1969), and in Michigan in *People v. Turner*, 210 N.W.2d 336 (Mich. 1973), and by legislative acts in New York in N.Y Penal Law § 40.05 (McKinney, 1987), in Illinois in Ill. Rov. Stat § 720ILCS 517-12 (1992), and in Texas in Tex. Penal Code Ann. § 8.06 (West, 1974). Commentators also overwhelmingly favor the objective approach. *People v. Barraza*, 23 Cal. 3d 675, 689 (1979).

125. *Russell*, 411 U.S. at 433.

amendment due process defense to outrageous governmental behavior.[126] The test for a due process violation is whether the actions of government officers violated those standards "implicit in the concept of ordered liberty."[127] Unlike subjective entrapment, the due process defense focuses entirely on the government's behavior.[128] In applying the due process defense, federal courts have followed the Court's advice in *United States v. Russell*[129] that due process is a defense only against the most outrageous governmental behavior. Courts, therefore, have construed this defense very narrowly.[130] For example, in *United States v. Simpson*,[131] the FBI persuaded a woman to offer sexual favors to the defendant in order to lure him into selling drugs. The court found this "very unsavory" but held that the due process defense did not apply.[132] Although the due process defense and objective entrapment are similar in that they both focus on police conduct rather than the defendant's predisposition, due process appears to apply to only the most extreme misconduct, while objective entrapment has a broader application.[133]

126. See *Hampton*, 425 U.S. at 495 (Powell, J., concurring) (asserting that *Russell* and earlier entrapment defense cases might prevent the conviction of a predisposed defendant in the face of outrageous police behavior); *Russell*, 411 U.S. at 431-32 (noting that "[w]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction").

127. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

128. See Gail M. Greaney, Note, *Crossing the Constitutional Line: Due Process and the Law Enforcement Justification*, 67 Notre Dame L. Rev. 745, 760 (1992) (observing that an entrapment defense is available under *Russell* to a defendant who is not predisposed to commit the crime at issue, and may even be available when the defendant *is* predisposed to the commission of such a crime).

129. 411 U.S. 423, 432 (1973).

130. In fact, in *Hampton*, a three justice plurality stated that no such defense exists. *Hampton*, 425 U.S. at 488-89. The Sixth Circuit, in *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994), held that the due process defense against police over-reaching is invalid.

131. 813 F.2d 1462 (9th Cir. 1987)

132. Id. at 1465.

133. As the court noted in *United States v. Jannotti*: "It is plain from the Court's opinion in *Russell* and the separate opinions in *Hampton*, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense." *United States v. Jannotti*, 673 F.2d 578, 607 (3rd Cir.).

V. ENTRAPMENT AS APPLIED TO GOVERNMENTAL MANIPULATION OF SENTENCING

The status of entrapment theory as applied to manipulation of sentencing is still unsettled. The First, Eighth, and Ninth Circuits[134] all endorse some form of the theory, the Eleventh Circuit[135] has explicitly rejected the theory, and the rest of the circuits remain undecided. The courts that endorse the theory or are undecided have further split according to how the theory should be conceptualized. This split over the correct form of sentence entrapment follows the split over general entrapment. Some courts articulate a subjective test, some an objective test, and others a due process test.

The four courts that to date have upheld a claim of sentence entrapment range throughout the spectrum of entrapment theory. The *Staufer* court applied a subjective test and focused on whether the defendant was predisposed to deal the larger amount of LSD demanded by the government agent.[136] The district court in *Barth* applied an objective test and focused entirely on the conduct of the government agents.[137] The district courts in *Cannon* and *Shepherd* applied both the subjective and objective tests, with the objective test closely resembling the due process defense.[138] Both courts held that they could exclude evidence from the sentence calculation based on the government's manipulative behavior.[139]

The sentence entrapment claim was first proposed in the Eighth Circuit and took the subjective form.[140] Now, most courts, including the First,[141] Fourth,[142] Seventh,[143] and Eighth[144] Circuits rec-

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134. *Connell*, 960 F.2d at 196; *Barth*, 990 F.2d at 425; *Staufer*, 38 F.3d at 1108.

135. *United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992).

136. 38 F.3d at 1108.

137. 788 F. Supp. at 1057-58. The court stated that it declined to resolve whether the defendant was predisposed to make the drug transactions. Instead, the court focused on the perseverance of the agents in engaging in sufficient transactions to place the defendant within a mandatory minimum sentence. Id.

As noted above, this holding was overturned on appeal by the Eighth Circuit, which held that the test should be subjective and should be focused on the defendant's predisposition. The court held that the defendant was predisposed to commit the crime and that, therefore, the district court should not have departed from the Guideline sentence.

138. *Cannon*, 886 F. Supp. at 709; *Shepherd*, 857 F. Supp. at 111.

139. *Cannon*, 886 F. Supp. at 708; *Shepherd*, 857 F. Supp. at 112.

140. See *United States v. Lenefsty*, 923 F.2d 1293, 1300 (8th Cir. 1991) ("We are not prepared to say there is no such animal as 'sentencing entrapment.' Where outrageous official conduct overcomes the will of an individual predisposed only to dealing in small quantities, this contention might bear fruit").

141. *Connell*, 960 F.2d at 194.

142. *United States v. Jones*, 18 F.3d 1145, 1153 (4th Cir. 1994).

ognize at least two distinct claims. The first, sentence entrapment, is based on a predisposition test like that articulated by the majority on the Supreme Court in defining subjective entrapment.[145] Sentence entrapment occurs when the government improperly causes a defendant to commit a more serious offense than he would otherwise have been predisposed to commit.[146] The test focuses on whether the defendant is really "guilty" of committing the crime at the higher level and, therefore, whether he deserves the stronger punishment. Sentence manipulation, the second claim, is based on an objective test emphasizing police conduct.[147] Sentence manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence.[148] The claim is essentially a means for the court to establish a code of conduct for undercover investigations and guard against behavior aimed solely at increasing a defendant's sentence.[149] Most courts agree that the label "sentence entrapment" cannot accurately apply to a test that focuses on governmental conduct because the essential aspect of the entrapment defense as articulated by the majority on the Supreme Court is the defendant's lack of predisposition to commit the crime.[150]

Shepherd and *Cannon*, the two cases that have upheld claims of sentence manipulation, based their decisions on the existence of governmental behavior that served no other purpose than to enhance the sentence.[151] Often, undercover agents will continue to purchase drugs long after they have enough evidence to convict the dealer

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143. *United States v. Cotts*, 14 F.3d 300, 306 n.2 (7th Cir. 1994). The *Cotts* court recognized the distinction between sentence entrapment and sentence manipulation, but expressed trepidation about the recognition of sentence manipulation as a valid legal claim: "[I]t is not clear to us what the precise legal objection to governmental behavior based on cognizance of relative penal consequences in this area could be (so long as it does not rise to the level of true entrapment)." Id.

144. *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993).

145. See *Sorrells*, 287 U.S. at 451.

146. *United States v. Okey*, 47 F.3d 238, 240 n.3 (7th Cir. 1995).

147. See *Connell*, 960 F.2d at 194 (differentiating between sentence entrapment and sentence manipulation). See also *Shepherd*, 4 F.3d at 649 (stating that "the argument is more appropriately referred to as sentence 'manipulation', since its focus is not on whether petitioner was predisposed to commit the crime, but instead on whether the DEA stretched out the investigation merely to increase the sentence"). But see *United States v. Gibbens*, 25 F.3d 28, 31 (1st Cir. 1994) (stating that "[w]hen an accusation of sentencing factor manipulation surfaces, the judicial gaze should, in the usual case, focus primarily—*though not exclusively*—on the government's conduct and motives" (emphasis added)).

148. *Okey*, 47 F.3d at 240.

149. *Cannon*, 886 F. Supp. at 707.

150. *Jones*, 18 F.3d at 1152-53.

151. *Shepherd*, 857 F. Supp. at 110-11; *Cannon*, 886 F. Supp. at 708-09.

because they are trying to gain evidence against those higher up in the organization.[152] This technique adds years to the dealer's sentence since the Guidelines aggregate the separate transactions, but it is an accepted practice because it has a legitimate investigatory goal.[153] In contrast, asking a defendant to convert powder cocaine to crack once he has already agreed to sell the officer the drug does not help the officer's investigation. It merely adds time to the defendant's sentence.[154] The court in *Shepherd* found this manipulative purpose on the part of the officer sufficient to support the defendant's claim of sentence manipulation and excluded the tainted transaction from consideration at sentencing.[155]

The courts are also split over whether to recognize two versions of the sentence manipulation claim with one version corresponding to objective entrapment and the other to the due process defense. The Fourth Circuit defines sentence manipulation in due process terms, making the claims one in the same.[156] The district courts in *Cannon*[157] and *Shepherd*[158] also use due process langnage when discussing the sentence manipulation claim. However, because these courts both found that the defense was valid and because the Supreme Court and lower federal courts have indicated that the due process defense is extremely disfavored or non-existent, *Shepherd* and *Cannon* probably did not apply a true due process defense.

The First Circuit in *Connell* hinted that a claim of sentence manipulation exists apart from a due process claim and that the sentence manipulation claim applies to behavior that does not rise to the level of a due process violation.[159] The Seventh Circuit also recognizes a difference between sentence manipulation and the due process claim, although the validity of the non-due process version of sentence manipulation is in question.[160]

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152. See, for example, *Barth*, 788 F. Supp. at 1058, in which the agent explained that after the fourth buy his main purpose in continuing to buy was "to get to the source."

153. See *Shepherd*, 857 F. Supp. at 110.

154. Id. at 110-11.

155. Id.

156. *Jones*, 18 F.3d. at 1153 (stating that sentence manipulation is "outrageous government conduct that offends due process").

157. *Cannon*, 886 F. Supp. at 707.

158. *Shepherd*, 857 F. Supp. at 110-11.

159. *Connell*, 960 F.2d at 194 (holding that the sentence manipulation defense "requires us to consider whether the manipulation inherent in a sting operation, even if insufficiently oppressive to support an entrapment defense . . . or [a] due process claim . . . must sometimes be filtered out of the sentencing calculus").

160. *Okey*, 47 F.3d at 240 (quoting *Cotts*, 14 F.3d at 306 n.2) ("If we are willing to accept the assumption apparently approved by Congress that [for example] dealing in greater quantities of drugs is a greater evil, it is not clear to us what the precise legal objection to governmental

In sum, when a defendant is faced with governmental manipulation of his sentence, he can make at least two, possibly three, distinct claims in arguing that a court should depart from the Guidelines or exclude evidence that would enhance his sentence. He can claim (1) sentence entrapment, which is essentially the descendant of subjective entrapment, (2) sentence manipulation in the form of objective entrapment, or (3) sentence manipulation in the form of the due process defense. The question remains as to which of the three tests—subjective, objective, or due process—is best suited to the sentencing context in light of the different policies underlying these tests.

VI. ANALYSIS OF ENTRAPMENT THEORY APPLIED TO GOVERNMENTAL MANIPULATION OF SENTENCING

A. Staufer *Revisited*

The court in *Staufer* relied on sentence entrapment to depart from the Guidelines.[161] In applying the test for sentence entrapment, the court focused on the defendant's predisposition.[162] The court avoided much discussion of the theory underlying this claim, relying instead on a weak statutory interpretation argument to support its departure. *Staufer*'s statutory interpretation provides a poor foundation for departure based on governmental manipulation of sentencing. To better justify such departure, courts must grapple with the policies underlying sentence entrapment and sentence manipulation and base their departure on the strength of these policies.

The Commission amended the Guidelines to allow departure in the specific situation of manipulation of sentencing accomplished when government agents sell drugs at below-market prices.[163] The court in *Staufer* argued that this amendment was proof that the Commission had considered the general problem of governmental manipulation of sentencing in undercover operations, had disapproved of

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behavior based on cognizance of relative penal consequences in this area could be (so long as it does not rise to the level of true entrapment or [outrageous government] conduct)"). See *United States v. Muthana*, 60 F.3d 1217, 1225 (7th Cir. 1995) (distinguishing sentence manipulation from due process claims).

161. 38 F.3d at 1107.

162. Id.

163. Amend. Application Note to § 2D1.1, ¶ 486 (cited in note 29).

such conduct, and had "expressly recognized" that courts could take into consideration the defendant's predisposition to deal in the quantity for which he was convicted.[164] The amendment asks whether the defendant's "available resources would have allowed him to purchase [the drugs]."[165] This language could arguably suggest the subjective predisposition test because the amount of money carried by a drug purchaser would be useful information in determining how much that person intended to buy.

The amendment, however, could just as easily be seen to advocate an objective test. The amendment makes no mention of words such as predisposition or intent that would indicate a subjective analysis.[166] Instead it asks whether the government set an artificially low price.[167] This seems to suggest a focus on the government's conduct and, therefore, an objective test.

Because the amendment supports either test, the court in *Staufer* was incorrect to conclude that the Commission "expressly recognized" that courts should examine a defendant's predisposition. Therefore, this amendment is poor support for a departure from the Guidelines based on the subjective claim of sentence entrapment. Based on the statutory language, the Commission does not favor one test over the other.[168]

The court in *Staufer* interpreted the Commission's condemnation of this one manipulative practice as evidence that the Commission had considered the general problem of manipulation and was condemning all manipulation of sentencing in undercover operations.[169] If this were the case, one would expect the amendment to have been written more broadly to cover more than just one particular form of manipulation. If anything, focusing on such a narrow range of manipulative behavior suggests either that the Commission has not considered manipulation in general, or that it has considered manipulation in general and has purposely limited departure to this one instance, prohibiting by implication departure in other instances of manipulation. Either way, the *Staufer* court was wrong to interpret the amendment as a general condemnation of manipulative sentencing.

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164. 38 F.3d at 1107.

165. Amend. Application Note to § 2D1.1, ¶ 486 (cited in note 29).

166. See id.

167. Id.

168. Id.

169. 38 F.3d at 1107 (noting that "[a]s [the] Amendment illustrates, the Sentencing Commission now expressly recognizes that law enforcement agents should not be allowed to structure sting operations in such a way as to maximize the sentences imposed on defendants").

Because the amendment is so unclear both as to whether it supports departure based on other forms of manipulation, as well as to whether departure should be based on the subjective sentence entrapment theory, *Staufer* bases its sentence entrapment departure on the weakest of foundations. Courts wishing to depart from the Guidelines based on manipulation of sentencing must build a better foundation for such departures if they intend to be upheld on appeal. The best starting point for this foundation lies in the policy underlying the three different claims of governmental manipulation of sentencing.

B. Sentence Manipulation—The Claim Best Suited to the Sentencing Context

Subjective entrapment in the form of sentence entrapment does not provide a sound basis for departure. The claim of subjective entrapment was developed for deciding guilt or innocence, not for adjusting sentences.[170] The decision regarding guilt or innocence involves different policies than does sentencing. Therefore, the subjective entrapment defense, developed for use in the former context, is ill-suited for use in the latter.

The Supreme Court has developed its entrapment theories solely in the context of determining guilt.[171] Commentators have pointed out that in its entrapment jurisprudence, the Supreme Court actually applies a balancing test rather than the pure predisposition test it purports to use.[172] As evidence, consider that courts only allow those who were induced by a government agent to claim entrapment.[173] However, whether a defendant is induced by an agent or by someone else, his predisposition to commit the crime is exactly the same.[174] Since the Court treats these two scenarios differently, the Court must be looking at something other than culpability in distinguishing between those induced by the government and those induced by private parties.[175]

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170. See *Sorrells*, 287 U.S. at 445 (adopting the subjective entrapment defense to conviction). For more discussion, see notes 107-119 and accompanying text.

171. See notes 107-19 and accompanying text. The Supreme Court has not yet ruled on the validity of the entrapment claim in the sentencing context.

172. Robinson, 2 *Criminal Law Defenses* § 209(b) at 513-16 (cited in note 118).

173. Id.

174. Id. at 515.

175. Id. at 513.

Instead of applying a pure predisposition test, the Supreme Court balances the goal of punishing the guilty against deterring police misconduct.[176] With its focus on police activity, the objective test is the logical choice if the goal is deterrence of police misconduct. The subjective test, which focuses on the guilt or predisposition of the defendant, is the logical choice if the concern is to ensure convictions of guilty parties. In choosing the subjective test over the objective test, the Supreme Court has made a policy choice in favor of convicting the guilty at the expense of deterring police misconduct.

This choice, however, was made for entrapment applied at trial, not at sentencing.[177] At trial a successful defense of entrapment sets the defendant free.[178] This is not the case with entrapment applied to sentencing. At sentencing, a successful sentence entrapment or sentence manipulation claim will not release anyone from custody. It will simply result in a sentence better tailored to the defendant's culpability. Therefore, the major reason in the trial context to choose a subjective sentence entrapment test over an objective test—concern about setting a guilty party free—does not apply in the sentencing context. Because one of the primary reasons for choosing the subjective test does not apply in the sentencing context, the balance should tilt in favor of applying an objective test in this context.

Another problem with the subjective version of sentence entrapment is that it presents a difficult proof problem. In evaluating entrapment at trial, the judge must distinguish between those who were predisposed to commit a crime and those who were not. This presents a difficult analysis.[179] To prove sentence entrapment, the judge must draw an even finer distinction between predisposition to commit the crime at one level and predisposition to commit it at another. The judge will have difficulty discerning how much of the drug the defendant originally wanted to buy, or how much of a defendant's decision to buy a particular amount of drugs resulted from the encouragement of the government agent. Therefore, a clear distinction between what the defendant was predisposed to do and what he

176. See id. at 514 (describing the divisions between members of the Court concerning the competing considerations of criminal predisposition of the defendant and unconscionable police conduct in an examination of sentence entrapment).

177. The Supreme Court has only ruled on entrapment as a defense to conviction. The Court chose the subjective test in this context. See, for example, *Sorrells*, 287 U.S. at 445.

178. Jeffrey W. Klak, Note, *The Need for a Dual Approach to Entrapment*, 59 Wash. U. L. Q. 199, 217 (1981).

179. See *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992) (holding that the government failed to establish the petitioner's predisposition to commit the crime for which he was convicted, thus necessitating a reversal of his conviction).

actually did will only become apparent in an extreme case where the government's behavior is outrageous and stands in sharp contrast to the behavior of the defendant. This makes the subjective version of entrapment useful in counteracting only the most egregious governmental behavior.

The goal of courts should be to create a practical defense to governmental manipulation of sentencing that courts can then use on a regular basis to curb the excesses caused by the Guidelines. Subjective entrapment does not effectively meet this goal. As evidence, consider that only one court in one case has upheld a defense of governmental manipulation of sentencing that was based solely on the subjective test, yet courts have had numerous opportunities to address the claim.[180] To combat anything less than truly outrageous manipulation, courts must adopt an objective test.

Further evidence that an objective test is the better defense is that sentence manipulation closely resembles the exclusionary rule, which is endorsed by the Supreme Court. The exclusionary rule is used to exclude evidence at trial that was seized in violation of the Fourth, Fifth, or Sixth Amendments.[181] Like an objective test applied at sentencing, the exclusionary rule is an objective test that focuses on police conduct.[182] Just as the objective test at sentencing excludes tainted evidence from the calculation of a sentence, the exclusionary rule excludes tainted evidence from the trial.

Public policy should favor an objective test applied at sentencing at least as strongly as it supports the exclusionary rule. In imposing the exclusionary rule, courts deter coercive police conduct related to gathering evidence for trial.[183] In excluding evidence from sentencing based on an objective test, the court would deter coercive police conduct affecting sentencing. The determination of guilt is a very important decision, but deciding whether to sentence someone

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180. *Staufer*, 38 F.3d at 1108. The other three cases that have upheld claims of sentence entrapment either applied an objective test (*Barth*), or held that sentence entrapment applied in the alternative to sentence manipulation (*Cannon*, *Shepherd*).

181. See *Mapp v. Ohio*, 367 U.S. 643, 657-60 (1961); *Weeks v. United States*, 232 U.S. 383, 398 (1914). See also Klak, 59 Wash. U. L. Q. at 217-18 & n.23 (cited in note 178) (comparing sentence entrapment to the exculsionary rule).

182. See *Mapp*, 367 U.S. at 654-57 (focusing upon the conduct of the government for the exclusionary rule determination).

183. See id. at 656 (noting that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it' "). See also Klak, 59 Wash. U. L. Q. at 218 n.123 (cited in note 178) (observing that "the exclusionary rule results only in the exclusion of the tainted evidence at the trial").

for five or for thirty years is equally significant.[184] The difference between the two rules is that excluding a key piece of evidence, such as a confession, at trial, often will affect whether the court convicts or acquits the defendant, while excluding evidence at sentencing only affects the extent of the defendant's punishment. Therefore, while the exclusionary rule and an objective test applied at sentencing both protect important goals—fairness at trial and fairness at sentencing—the exclusionary rule has the large potential cost of setting a guilty party free.[185] An objective test at sentencing does not share this cost. Since courts uphold the exclusionary rule despite this cost, courts should do the same for an objective test applied at sentencing.

In adopting an objective test, courts could choose either sentence manipulation in the due process form or sentence manipulation in the less demanding objective entrapment form. Both tests avoid the problems of the subjective test. Basing the test on objective entrapment rather than due process will allow a court to reach police behavior that does not rise to the level of outrageous conduct necessary to support the due process claim.[186] Also, appellate courts may be more lenient in reviewing departures based on objective entrapment than those based on due process. Rarely have the courts of appeals upheld due process entrapment claims, and the Supreme Court has never found due process violated in an entrapment case.[187] The Sixth Circuit absolutely rejects the claim as does a plurality of the Supreme Court.[188] Furthermore, there is a logical flaw in arguing

184. See *Cannon*, 886 F. Supp. at 707 (indicating the disparity in sentencing that can result from the practice of sentence manipulation).

185. See *Mapp*, 367 U.S. at 659 (discussing the necessity of setting some criminals free in order to maintain the sanctity of the judicial process).

186. See *Connell*, 960 F.2d at 194. The Court in *Connell* seems to distinguish between the severity of behavior necessary to satisfy sentence manipulation and that which will satisfy a due process defense. See note 159.

187. See *Russell*, 411 U.S. at 433 (rejecting the defendant's claim of entrapment based on due process and rejecting the idea that entrapment rests on a constitutional basis); *Hampton*, 425 U.S. at 485-91 (illustrating a plurality of the Court again rejecting the due process claim for a predisposed defendant). For federal courts of appeals cases denying claims of entrapment based on due process, see *Owen v. Wainwright*, 806 F.2d 1519, 1522 (11th Cir. 1986) (holding that "the government participation alleged here falls far short of the extremely outrageous and shocking conduct necessary to establish a due process violation"); *United States v. Walther*, 867 F.2d 1334, 1345 (11th Cir. 1989) (finding no due process violation where the government initiated negotiations, provided the location for the transaction, transported the narcotics, and supplied the narcotics); *United States v. Nixon*, 777 F.2d 958, 962 (5th Cir. 1985) (holding that due process was not violated even though the undercover agent tried to scare the defendants into purchasing marijuana by throwing a violent temper tantrum).

188. *Hampton*, 425 U.S. at 490 (Powell, J., concurring); *United States v. Tucker*, 28 F.3d 1420, 1421 (6th Cir. 1994).

for a reduction in a sentence based on a violation of the Due Process Clause. The D.C. Circuit in *United States v. Walls*[189] explained that if the governmental conduct was not so outrageous as to support a due process claim at the conviction stage, then the same conduct cannot give rise to a due process claim at the sentencing stage. In short, a valid conviction presupposes that there is no due process violation. Therefore, a convicted person cannot argue later that a due process violation should be grounds for a sentence reduction.[190] Clearly, objective entrapment is a better basis than due process for the claim of sentence manipulation.

VII. OTHER SOLUTIONS: HOW THEY COMPARE TO SENTENCE MANIPULATION

While sentence manipulation is the best judicial solution to governmental manipulation of sentencing, it is not the only solution. Because the source of manipulation of sentencing is the Guidelines, the problem of manipulation could be addressed by changing the Guidelines.

Constitutional challenges to the Guidelines have been tried and have failed. *Mistretta v. United States* held that the creation of the Sentencing Commission did not violate separation of powers principles.[191] Due process claims have also been unsuccessful, with the federal courts of appeals holding that non-individualized sentencing does not violate due process.[192]

Congress could change the basic structure of the Guidelines by shifting the emphasis away from harm and quantity, and back to judicial discretion. More judicial discretion would reduce manipulation by the government and reduce this source of disparity in sentences, but it would also lead back to the original source of disparity—different judges giving different sentences. The solution lies not in fundamentally altering the Guidelines and changing the roles of the different actors in the sentencing system. Instead, the Guidelines should be fine-tuned to compensate for governmental manipulation.

The Guidelines were designed to be an evolutionary system with the Commission acting as a permanent body that could revise

189. 70 F.3d 1323 (D.C. Cir. 1995).
190. Id.
191. 488 U.S. 361, 412 (1989).
192. See, for example, *United States v. Seluk*, 873 F.2d 15 (1st Cir. 1989).

the Guidelines as needed.[193] The Commission should perform this function and revise the Guidelines to compensate for manipulation of sentencing. The Commission could create additional amendments similar to the one cited in *Staufer* to provide a separate departure for every conceivable form of manipulation. This, however, would be a daunting task, and those who experienced forms of manipulation that the Commission had not identified would still be left without a remedy. Ideally, the Commission should amend the Guidelines to provide a departure based on sentence manipulation, broadly defined as "egregious governmental behavior aimed solely at increasing the severity of a sentence and serving no valid investigatory purpose." The Commission should leave it up to the courts to create a common law of what specific behavior constitutes sentence manipulation. This would return some discretion to judges but only in a narrow area. Furthermore, since departures are subject to appellate review for reasonableness, this discretion would be held in check and would therefore not lead back to the kind of disparity existing before the Guidelines.

The executive branch could also address the problem. The Attorney General could produce regulations governing undercover investigations and could proscribe the specific tactics that United States Attorneys and agents use to manipulate sentencing.[194] However, the inherent conflict of interest in leaving prosecutors and agents, who have a career interest in successfully fighting crime, to guard the interests of defendants will not afford defendants the best protection.

One commentator has argued that such regulations should be directed at prosecutors because prosecutors have an ethical duty to do justice.[195] However, if prosecutors always adhered to their ethical duties, the problem of manipulation would not exist in the first place. While regulations governing prosecutors and law enforcement agents may cut down on some manipulation, those with a conflict of interest should not be relied upon to protect the interests of others.

Regardless of which other solutions are enacted, sentence manipulation should play a role. If the Commission amends the Guidelines, it should make general sentence manipulation a ground for departure. If, instead, the Commission targets particular forms of manipulation, sentence manipulation should still play a role as a

193. See Breyer, 17 Hofstra L. Rev. at 5 (cited in note 41) (documenting the creation of the Federal Sentencing Commission).

194. Underhill, 1994 Ann. Surv. Am. L. at 198-200 (cited in note 83).

195. Id. at 197.

defense for those who experience manipulation that does not fit into one of the Commission's categories for departure. If the executive branch tries to regulate its own behavior, sentence manipulation should act as a backstop when conflicts of interest cause the regulations to fail.

VIII. CONCLUSION

The Guidelines mark an enormous change in federal court sentencing practices. This change brings new opportunities for abuse and disparity in treatment. One of these abuses is governmental manipulation of sentencing. Departure from the Guidelines or exclusion of evidence from sentencing based on the sentence manipulation theory provides the best solution to the problem of governmental manipulation of sentencing.

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